

JURY AWARDS FOR MEDICAL MALPRACTICE AND POST-VERDICT ADJUSTMENTS OF THOSE AWARDS

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The civil jury continues to be at the center of an ongoing debate about a tort crisis and the need for "tort reform."¹ While some of this controversy involves charges that juries are biased or incompetent in deciding liability² and engage in extravagance and caprice in rendering punitive damages,³ equally important charges involve juries' compensatory awards, particularly the general damages portion that many scholars have tended to label exclusively as pain and suffering.⁴ While little attention seems to be given to special, or economic, damages in the debate, it is alleged that the "pain and suffering" component con-

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1. See STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* (1995); NEIL VIDMAR, *MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS AND OUTRAGEOUS DAMAGE AWARDS* (1995); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996); Peter H. Schuck, *Mapping The Debate in Jury Reform*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 306 (Robert E. Litan ed., 1993).

2. For a general discussion of this debate, see VIDMAR, *supra* note 1.

3. DANIELS & MARTIN, *supra* note 1, at 199; Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1276 (1993).

4. W. KIP VISCUSI, *REFORMING PRODUCTS LIABILITY* 10 (1991); David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1141 (1995); Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling Pain and Suffering Awards*, 83 NW. U. L. REV. 908, 912 (1989); Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Award*, 23 HOFSTRA L. REV. 763, 765 (1995); Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1789 (1995); Marc Geistfield, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 775, 776 (1995); Edward T. McCaffery, *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341, 1344 (1995).

stitutes the largest portion of awards,⁵ is not rationally defensible, and, moreover, is highly variable and capricious from case to case.⁶

Over the past two decades, a sizable number of studies have produced results that contradict the most extreme of the various claims about civil juries.⁷ This literature includes some studies bearing on total awards and others attempting to separately isolate general damages.⁸ As will be discussed below, some of these studies are plagued by methodological and conceptual problems while others are limited in the extent to which the findings can be generalized.⁹

Additionally, both commentaries and empirical studies have tended to ignore the important question of whether plaintiffs receive the actual jury award or some other amount.¹⁰ A striking example of post-verdict adjustment occurred in the now notorious McDonald's coffee burn case.¹¹ The jury awarded \$160,000 in compensatory damages for the severe burns suffered by the plaintiff and \$2,700,000 in punitive damages.¹² The punitive component was reduced by the trial judge to \$480,000, resulting in a final judgment of just \$640,000.¹³ Subsequently, the case was settled by the parties, presumably for a lesser amount still. Little systematic research has been devoted to studying the extent to which the reductions made in the McDonald's case may be typical of other personal injury cases even though information about the issue obviously has major implications for the jury controversy.

This article is a first report of a larger study of jury awards and post-verdict adjustments of those awards using data from three jurisdictions: New York City and surrounding areas, Florida, and California.

5. PAUL WEILER, *MEDICAL MALPRACTICE ON TRIAL* 54 (1991); Croley & Hanson, *supra* note 4, at 1789; Kirk B. Johnson et al., *A Fault-Based Administrative Alternative for Resolving Medical Malpractice Claims*, 42 VAND. L. REV. 1365, 1397 (1989).

6. VISCUSI, *supra* note 4, at 105; Baldus et al., *supra* note 4, at 1118; Bovbjerg et al., *supra* note 4, at 912; Chase, *supra* note 4, at 768; Geistfield, *supra* note 4, at 783.

7. Neil Vidmar, *The Performance of the American Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1998).

8. *Id.*

9. *See infra* notes 75-90.

10. *But see* MICHAEL G. SHANLEY & MARK A. PETERSON, *POSTTRIAL ADJUSTMENTS TO JURY AWARDS* vii (1987); Baldus et al., *supra* note 4, at 1168 (determining how awards are adjusted when they fall outside the range of reasonableness); Ivy E. Broder, *Characteristics of Million Dollar Awards: Jury Verdicts and Final Disbursements*, 113 JUST. SYS. J. 349, 353 (1986).

11. *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV 93-02419, 1995 WL 360309 (D.N.M. Aug. 18, 1994). For discussion of this case and additional references about it, see Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 4 (1996).

12. *Liebeck*, 1995 WL 360309, at *1.

13. Gross & Syverud, *supra* note 11, at 5.

These jurisdictions were chosen because they require the jury to specify each element of damages in the verdict, thus allowing a direct assessment of special and general damages. Our data were obtained from commercial verdict reporters. Although these data sets present a number of methodological problems, they overcome some of the weaknesses in prior studies. Additionally, the verdict reporters provide information bearing on post-trial reductions and settlements that allow us to study what happens to jury awards in the post-verdict phase of the litigation process. We focus exclusively on medical malpractice cases for this article, although later studies will consider product liability and automobile negligence cases.

In Part I, we review research literature bearing on jury awards for compensatory damages with particular attention to general damages in malpractice actions.¹⁴ Part I also sets forth methodological and conceptual criticisms of the prior research.¹⁵ Part II reviews the sparse research on post-trial adjustments of jury awards.¹⁶ Part III explains the rationale of the present research and limitations of the data.¹⁷ Part IV presents the results,¹⁸ and Part V discusses the implications of these results.¹⁹

I. PREVIOUS EMPIRICAL RESEARCH ON COMPENSATORY AWARDS

A. Total Awards

Brian Ostrom and his co-authors at the National Center for State Courts ("NCSC") conducted a study of jury awards that were rendered in 1992 in a nationwide sample of fifty-two urban state courts.²⁰ Plaintiffs prevailed in 30% of medical malpractice trials.²¹ The median verdict, including punitive damages, in all tort cases was \$51,000.²² The mean award was much higher, \$408,000.²³ The discrepancy between median and mean was produced by some very large awards. When the top and bottom 5% of these outlier awards were excluded, the mean was \$160,000.²⁴ Medical malpractice cases, how-

14. See *infra* Part I.

15. See *infra* Part I.

16. See *infra* Part II.

17. See *infra* Part III.

18. See *infra* Part IV.

19. See *infra* Part V.

20. Brian J. Ostrom et al., *A Step Above Anecdote: A Profile of the Civil Jury in the 1990's*, 79 JUDICATURE 233 (1996).

21. *Id.* at 236.

22. *Id.* at 238.

23. *Id.*

24. *Id.*

ever, had substantially higher awards.²⁵ The median award was \$201,000 and the mean was \$1,057,000.²⁶ When outlier awards were excluded, the mean was \$432,000.²⁷ Fully 15% of malpractice awards exceeded \$1 million.²⁸ The malpractice win rates and awards in the NCSC study are similar to those found in other studies.²⁹ There are two important cautions in interpreting these data, however. First, the discrepancy between tort awards overall and malpractice awards is likely due, in large part, to differences in how malpractice cases are selected for trial.³⁰ Comparing across case types is comparing apples and oranges. Second, while the data provide important information about the overall magnitude of awards, they do not tell us anything about the appropriateness—or inappropriateness—of awards.

A few studies attempted to compare jury awards against various criteria that allowed a rough test of the claims that jury awards are unrelated to plaintiff losses. Patricia Danzon studied a sample of insurers' claim files for California medical malpractice cases that were closed during 1974 and 1976.³¹ Approximately 7% went to trial, and plaintiffs prevailed 28% of the time.³² She compared the awards with estimates of economic losses, injury, severity and age of the plaintiff.³³ The analyses led her to conclude that, in general, jury awards were related to the magnitude of plaintiffs' losses.³⁴

Randall Bovbjerg and his co-authors analyzed a sample of 898 personal injury cases that had a median award of \$82,000 and a mean of \$490,000 in 1987 dollars.³⁵ The cases were also coded according to seriousness of plaintiff injury according to the National Association of Insurance Commissioners ("NAIC") nine-point scale of physical injury.³⁶ Awards increased with level of injury severity, except when death occurred; the amounts in death cases were substantially lower than when plaintiffs suffered permanent major or grave injuries.³⁷ Se-

25. *Id.*

26. Ostrom et al., *supra* note 20, at 238.

27. *Id.*

28. *Id.* at 237.

29. Vidmar, *supra* note 1, at 39.

30. See *id.* at 49; Neil Vidmar, *Pap and Circumstance: What Jury Verdict Statistics Can Tell Us About Jury Behavior and the Tort System*, 28 SUFFOLK U. L. REV. 1205, 1212 (1994).

31. PATRICIA DANZON, *MEDICAL MALPRACTICE: THEORY, EVIDENCE AND PUBLIC POLICY* 40-42 (1985).

32. *Id.* at 38.

33. *Id.*

34. *Id.*

35. Bovbjerg et al., *supra* note 4, at 923.

36. *Id.*; see THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, *MALPRACTICE CLAIMS: FINAL COMPILATION* 48-66 (M. Sowka ed., 1980). The scale is discussed *infra* note 146.

37. Bovbjerg et al., *supra* note 4, at 923.

verity of injury alone explained about two-fifths of the variation in awards and other factors accounted for one-fifth.³⁸ The authors speculated that most of the remaining variability might be due to jury unreliability.³⁹

W. Kip Viscusi also compared jury awards in a sample of product liability cases against injury seriousness assessed by the NAIC scale.⁴⁰ He, too, concluded that awards were related to injury.⁴¹ However, he also found that there was a lot of variability within levels of injury and ascribed it to jury unreliability.⁴²

Stephen Daniels and Joanne Martin compared medical malpractice and product liability verdicts in a large sample of cases from around the nation and also found that awards were related to injury.⁴³ In another study, Mark Taragin and his co-authors found that the payment to plaintiffs following a jury award was positively related to severity of injury.⁴⁴

The variability within levels of injury might be related to jury unreliability or bias in awarding damages as Bovbjerg and his co-authors and Viscusi speculated, but there is a plausible alternative interpretation that might account for much of the variance. Frank Sloan and his co-authors independently assessed the actual economic losses of a sample of plaintiffs in Florida medical malpractice cases.⁴⁵ Sloan and his co-investigators found that within levels of injury, economic losses varied substantially from patient to patient.⁴⁶ In hindsight, this finding should surprise no one. The past and future economic losses of a forty-year-old corporate executive would be much greater than the losses of a seventy-year-old retired bricklayer, even if both suffered equally debilitating injuries. Sloan and his co-authors' finding is only indirect evidence bearing on a possible explanation of variability of jury awards in the previous studies, but it is consistent with the alternative explanation of jury variability. If the individual juries heard different evidence about the economic consequences of the injury, then variability in their awards may have been only a response to that evidence.

38. *Id.*

39. *Id.*

40. VISCUSI, *supra* note 4, at 103.

41. *Id.* at 50-54.

42. *Id.* at 95-99.

43. DANIELS & MARTIN, *supra* note 1, at 175.

44. Mark I. Taragin et al., *The Difference of Standards of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 ANNALS INTERNAL MED. 780, 781 (1992).

45. FRANK A. SLOAN ET AL., *SUING FOR MEDICAL MALPRACTICE* 168 (1993).

46. *Id.*

B. Studies of General Damage Awards Based on Jury Reports and Closed Claim Files

The "pain and suffering" portion of jury awards has come in for particular criticism in the jury debate. One committee of the American Medical Association, for example, asserted that pain and suffering accounted for 80% of awards in excess of \$100,000,⁴⁷ and other authors have claimed that it is in excess of 50% of awards.⁴⁸ Additionally, it is often asserted that there is a great deal of variability in the amounts that are given for "pain and suffering," and this has been ascribed to jury incompetence or capriciousness.⁴⁹ Some research appears, on the surface, to be consistent with these claims.⁵⁰

Before proceeding further, note that we have intentionally chosen to use the term "general damages" as the label for the total component of the compensatory award that is not special damages. As will be clear from our discussion in Sections 1 and 2, pain and suffering is only one element among others that are not special damages.⁵¹ Hence, we place quotation marks around the term when authors utilize pain and suffering as a generic term.

1. Prior Research

Danzon attempted to make estimates of "pain and suffering" awards in a sample of medical malpractice cases from closed claim data from Florida.⁵² These data were supplemented with data from other jurisdictions.⁵³ She limited her analyses to "large" damage award cases.⁵⁴ She concluded that among plaintiffs who received large awards, 51% received a "pain and suffering" component in excess of \$100,000.⁵⁵ There are many problems with her data and conclusions, including the facts that disparate data sources were combined under questionable assumptions, there was a great deal of missing data, and her estimates of economic losses were, by her own admission, "unreliable."⁵⁶

47. Johnson et al., *supra* note 5, at 1369.

48. WEILER, *supra* note 5, at 55.

49. VISCUSI, *supra* note 4, at 105; Bovbjerg et al., *supra* note 4, at 913.

50. See *infra* notes 52-74 and accompanying text.

51. See *infra* notes 52-90 and accompanying text.

52. Patricia M. Danzon, *Florida Malpractice Awards for Pain & Suffering*, in MEDICAL MALPRACTICE POLICY GUIDEBOOK 132 (Henry G. Manne ed., 1985).

53. *Id.*

54. *Id.*

55. *Id.* at 133.

56. A more detailed critique of the Danzon study is contained in Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217, 222 (1993).

Viscusi similarly attempted to estimate the “pain and suffering” component of jury awards in a sample of product liability cases obtained from a survey of closed claim files conducted by the Insurance Services Offices (“ISO”).⁵⁷ The ISO estimates of the plaintiff’s economic loss were used as the measure of economic loss and subtracted from the total award to obtain an estimate of “pain and suffering.”⁵⁸ Viscusi concluded that, while the “pain and suffering” component of awards varied by type of loss and other factors, that component averaged close to 70% of total jury awards.⁵⁹

Bovbjerg, Sloan, and Blumstein conducted still another study involving a sample of personal injury cases.⁶⁰ Bovbjerg and his co-authors disaggregated the cases according to severity of physical injury as defined by the NAIC’s nine-level scale.⁶¹ These authors also used estimates of economic loss and subtracted it from the total award to estimate the pain and suffering component.⁶² However, the data set involved a great deal of missing information on economic or special damages.⁶³ Bovbjerg and his co-authors found that the estimates of the “pain and suffering” component increased with injury severity, except that when death occurred, the average amount of non-economic damages decreased sharply.⁶⁴ Although concluding that, at the gross level, “pain and suffering” awards appeared consistent with severity of injury, Bovbjerg and his co-authors observed that there was great variability within levels of severity.⁶⁵ While acknowledging that the variability could be a result of actual degree of plaintiff suffering reflected in the evidence produced at trial, Bovbjerg and his co-authors offered the conclusion that jury awards for “pain and suffering” were probably unreliable.⁶⁶

Frank Sloan and his co-authors conducted a study of medical malpractice cases from a sample of birth injury and emergency room injury closed claims that occurred in Florida in the 1980s.⁶⁷ Thirty-seven

57. VISCUSI, *supra* note 4, at 43.

58. *Id.* at 104.

59. *Id.* at 102-09.

60. Bovbjerg et al., *supra* note 4, at 919.

61. *Id.*; *see infra* pp. 273-75 (describing and critiquing the NAIC scale).

62. Bovbjerg et al., *supra* note 4, at 919.

63. The initial sample involved 898 cases, but the estimates of pain and suffering in awards was based on 368 cases, an attrition rate of 59%. *See* Bovbjerg et al., *supra* note 4, at 923-24. These problems are discussed in Vidmar, *supra* note 30, at 1218-20.

64. Bovbjerg et al., *supra* note 4, at 932-36.

65. *Id.*

66. *Id.*

67. SLOAN ET AL., *supra* note 45, at 24.

of the cases were decided by juries.⁶⁸ Like the other studies just described, Sloan and his co-authors estimated the general damage component by subtracting economic loss from the total award.⁶⁹ However, unlike the other studies, which relied upon estimates of economic damages collected by others, Sloan and his co-authors conducted detailed interviews with plaintiffs and reviewed medical records and other data for each case.⁷⁰ As discussed above, an important finding from the study was that economic losses of plaintiffs varied greatly within severity of injury categories.⁷¹ From these data, Sloan and his co-authors concluded that, on average, the amount that plaintiffs received above their economic losses following a jury award constituted only 22% of the total payment.⁷² It is essential to note that Sloan and his co-authors' data involved estimates of what the plaintiff actually received after judgment rather than the actual jury verdict,⁷³ a point that we will return to in Part II.⁷⁴

2. *Methodological and Conceptual Problems*

There are a number of methodological and conceptual problems with the above studies that raise serious questions about the conclusions that the authors drew from them. One methodological problem involved the high incidence of missing data. The Danzon research had to combine disparate data sources to achieve a sufficient sample size, but in the end many data points were missing.⁷⁵ This was also true of the Viscusi data.⁷⁶ The Bovbjerg study had an attrition rate of almost two-thirds, and the final results of this much-reduced sample showed inconsistencies that are hard to explain logically.⁷⁷

A second methodological problem results from attempting to estimate the general damages component by subtracting the special damages from the total. Vidmar referred to this as the "unreliable subtrahend" problem due to the fact that estimates of special damages may be biased or subject to considerable variability.⁷⁸ The clerks who gather the data for commercial verdict reporters sometimes get their

68. *Id.* at 195.

69. *Id.*

70. *Id.* at 17.

71. *Id.* at 24.

72. *Id.* at 220.

73. SLOAN ET AL., *supra* note 45, at 220.

74. *See infra* Part II.

75. Vidmar, *supra* note 30, at 1225-34.

76. *Id.*

77. *See id.* at 1223.

78. *Id.* at 1224.

estimates of special damages from the plaintiff lawyer only or from the defendant lawyer only while, for other cases, they may get them from both sides and average any differences. Plaintiff lawyers are prone to overestimate special damages while defense lawyers will underestimate them. If only one source for the data is used, the subtrahend will be larger or smaller than it should be. If the plaintiff is the source of the estimate for one case, the defendant for another, and if both sides are averaged for a third, there will be differences in the subtrahend that are method variance rather than jury variance. In the Viscusi study, the estimate of specials, or non-economic components, were all from a defense perspective, raising concerns about an underestimate of plaintiff losses and a consequent overestimate of general damages. These problems were absent from the Sloan study, but, as mentioned, its sample size was quite small and the data involved the payment received by the plaintiff rather than the jury award.

Further issues make it difficult to attribute variability of awards to jury unreliability. The verdict reports tell us nothing at all about what the jury heard in testimony. A related problem arises from use of the NAIC scale, which codes injury seriousness solely according to physical injury. In medical malpractice cases, for example, a sexual assault by a doctor could result in severe mental anguish, emotional distress, anxiety, and loss of consortium by the plaintiff's spouse. Negligent administration of a drug that made the patient permanently psychotic would also be a severe trauma. Similarly, a wrongful birth case does not involve permanent physical trauma. Under the NAIC scale, these harms would probably be classified as minor since there is no demonstrable physical injury.

While the validity of the NAIC scale classification system is serious enough, there is an even more important problem associated with drawing inferences of similar pain and suffering from physical injury alone because no consideration is given to either the actual degree of pain and mental trauma, or the past and future duration of that pain. One person who has a limb amputated will experience severe phantom pain whereas another will experience little or no such pain. A twelve-year-old amputee with severe phantom pain can be actuarially expected to endure sixty or more years of that pain whereas a seventy-two-year-old can be expected to endure a briefer period. In short, drawing inferences about seriousness of pain and suffering from degree of physical injury alone can be very misleading. But the jury hears directly about those sentient states and their expected duration. The variability in awards within categories of injury could be due in whole, or in part, to the evidence at trial.

The final problem is conceptual, namely labeling all general damages as "pain and suffering." Pain and suffering is defined as compensation for physical pain.⁷⁹ General damages may include such elements as disfigurement, loss of parental guidance, loss of parental companionship, loss of moral training, loss of consortium, emotional distress, mental anguish, loss of enjoyment of life, and human damages.⁸⁰ While some of these elements may entail the psychological equivalent of pain and suffering, others may have arguable economic components. For example, in response to a vignette involving a woman whose face was severely disfigured, but who returned to work, jurors considered the potential impact of the disfigurement on her chances for job advancement and on the stability of her marriage.⁸¹ With regard to the marriage issue, jurors interviewed after an actual jury trial involving a woman who suffered moderate brain damage frankly discussed the potential consequences for her current marriage and the fact that divorced women often suffer substantial drops in income.⁸² In pattern instructions the jurors are cautioned that they should not award compensation for disfigurement when economic elements are given in some other item in the damages,⁸³ but the instruction appears to give juries discretion in determining economic components. Similar discretion appears to be granted with respect to mental anguish,⁸⁴ anxiety relating to future disease,⁸⁵ loss of consortium,⁸⁶ and loss of parental guidance and consortium.⁸⁷ There are, of course, normative issues associated with all aspects of general compensatory damages, but the important point to be made is that the label "pain and suffering" as a synonym for general damages greatly oversimplifies the complex human judgments that case law and statutory law asks juries to make.

Despite these sources of error, which potentially add a great degree of methodological variability, the studies do allow a rough conclusion that both overall awards and their general damages components appear to be related to seriousness of injury and economic loss.⁸⁸ This is

79. RONALD W. EADES, JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS 321 (3d ed. 1993).

80. *Id.* at 264-402.

81. Neil Vidmar et al., *Damage Awards and Jurors' Responsibility Ascriptions in Medical Versus Automobile Negligence Cases*, 12 BEHAV. SCI. & L. 149, 154 (1994).

82. See VIDMAR, *supra* note 1, at 241.

83. EADES, *supra* note 79, at 328.

84. *Id.* at 342.

85. *Id.* at 346.

86. *Id.* at 330.

87. *Id.* at 66-67.

88. VISCUSI, *supra* note 4, at 214-15; Bovbjerg et al., *supra* note 4, at 913.

because the relationship appears in so many studies. However, the issue of size of the general damages component and variability within category of seriousness may be explained by factors other than inter-jury variability.⁸⁹ Only Sloan and his co-authors' study is methodologically adequate, and it shows that variability of economic loss may explain much jury verdict variability.⁹⁰ The primary difficulty with the Sloan study is its small and unrepresentative sample of cases. In short, we have very little reliable information about what percentage of jury awards are for general damages, let alone the pain and suffering component.

C. Studies of Pain and Suffering Involving Controlled Experiments

Experimental research has studied the elements of pain and suffering and disfigurement but not other components of general damages. Vidmar and his co-authors conducted a number of experiments involving jurors awaiting jury duty.⁹¹ Two of the studies also compared juror decisions with those rendered by senior lawyers.⁹² In the first experiment, Vidmar and Jeffrey Rice provided two samples of jury-eligible laypersons and a sample of lawyers with a detailed description of a patient who suffered a severe burn and disfiguring scar on her knee during a surgical procedure.⁹³ The doctor's liability was not contested, and the economic damages were stipulated.⁹⁴ Both jurors and lawyers were asked to assess a damage award for pain and suffering and for disfigurement.⁹⁵ The study found that while individual jurors showed more variability in awards than the lawyers, the mean, or average, award was not significantly different between the laypersons and professionals.⁹⁶ Furthermore, if twelve, or even six, jurors had combined their estimates of awards, as would be the case for a jury, it is probable that the damage awards would have been more stable, on average, than if the case was decided by a judge in a bench trial.⁹⁷ The study further uncovered the fact that the reasoning processes of laypersons and professionals in rendering the awards was not basically

89. See Vidmar, *supra* note 30, at 1231-34.

90. See SLOAN ET AL., *supra* note 45, at 145-47.

91. Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883 (1993).

92. *Id.* at 891.

93. *Id.*

94. *Id.*

95. *Id.* at 892.

96. *Id.* at 896.

97. Vidmar & Rice, *supra* note 91, at 897.

different.⁹⁸ A subsequent experiment by Neil Vidmar and David Landau, involving a more serious malpractice injury and with new groups of laypersons and legal professionals, replicated the basic findings of the first experiment.⁹⁹

In another experiment involving jurors only, the cause of an injury was ascribed to either medical negligence or to automobile driving negligence.¹⁰⁰ Additionally, for each type of injury there was a single defendant, two defendants or a corporate defendant.¹⁰¹ Neither the cause of the injury nor the number or type of defendants had an effect on the pain and suffering award.¹⁰² In a fourth experiment, Vidmar and his co-authors varied the possible contributory responsibility of the plaintiff because some of the previous experiments suggested that this might play a role in awards.¹⁰³ The results offered support for this hypothesis.¹⁰⁴

Roselle Wissler and her co-authors conducted two jury simulation experiments with psychology students that involved a series of personal injury cases.¹⁰⁵ The seriousness of the plaintiff's injury was related to perceptions of the amount of harm suffered and to the amount of the award for pain and suffering.¹⁰⁶ In both experiments, the degree of the plaintiffs' perceived disability and mental suffering were stronger predictors of awards than pain and disfigurement.¹⁰⁷

In another set of experiments in the same research program, Allen Hart and his co-authors distinguished injuries resulting from unusual circumstances from those that are commonly held beliefs about the typical causes of injuries.¹⁰⁸ Pain and suffering awards were larger and more variable when the injury was caused by unusual circumstances.¹⁰⁹

A further study by Michael Saks and his co-authors compared methods of providing guidance on pain and suffering awards to simu-

98. *Id.* at 896.

99. The Vidmar and Landau experiment is reported in VIDMAR, *supra* note 1, at 221-35.

100. Vidmar, *supra* note 56, at 241.

101. *Id.* at 242.

102. *Id.* at 255.

103. Vidmar et al., *supra* note 81, at 151-52.

104. *Id.* at 157-59.

105. Roselle L. Wissler et al., *Explaining "Pain and Suffering" Awards: The Role of Injury Characteristics and Fault Attributions*, 21 LAW & HUM. BEHAV. 181, 186 (1997).

106. *Id.* at 186-87.

107. *Id.* at 187.

108. Allen J. Hart et al., *Injuries, Prior Beliefs and Damage Awards*, 15 BEHAV. SCI. & L. 63, 64-65 (1997).

109. *Id.* at 72.

lating jurors.¹¹⁰ Four conditions involved giving jurors information about average past awards, information about intervals of past awards, a combination of averages and intervals, and/or a cluster of examples of past awards.¹¹¹ The experiment also had a "no-guidance" control condition and a condition involving a cap on awards.¹¹² Saks and his co-authors found that all of the jury guidance conditions reduced variability of awards in comparison to the control conditions.¹¹³

Controlled laboratory experiments are subject to problems of generalizability or external validity because the participants may consist primarily of college students, the cases involve short summaries of evidence, and mock jurors may not feel the same responsibility as jurors in a real case.¹¹⁴ Nevertheless, these experiments provide insights about the dynamics of juror decision processes. They suggest that legal training and experience is not necessarily superior to the consensus of twelve laypersons. In fact, lawyers and laypersons appear to reason about pain and suffering in similar ways. The studies also suggest that extra-legal factors do not have the impact that they are alleged to have on the size or variability of juror awards.

The central issue with simulation research is the problem of its artificiality, and the consequent limitations on confidence in our ability to generalize to real world juries. In particular, it cannot address the incidence and magnitude of actual jury awards that have charged the tort reform debate.

D. Juror Interviews

Another approach to attempting to understand how jurors make decisions on awards is through interviews with jurors. Valerie Hans conducted a study of jurors who decided cases involving corporate de-

110. Michael J. Saks et al., *Reducing Variability in Civil Jury Awards*, 21 LAW & HUM. BEHAV. 243, 246 (1997).

111. *Id.* at 247.

112. *Id.*

113. *Id.* at 253-55.

114. Several other research studies provide data that is consistent with these studies although the authors did not specifically isolate the pain and suffering component of awards. See Brian H. Bornstein & Michelle Rajki, *Extra-Legal Factors and Product Liability: The Influence of Mock Jurors' Demographic Characteristics and Intuitions about the Cause of an Injury*, 12 BEHAV. SCI. & L. 127 (1994); Corinne Cather et al., *Plaintiff Injury and Defendant Reprehensibility: Implications for Compensatory and Punitive Awards*, 20 LAW & HUM. BEHAV. 189 (1996); Neal Feigenson et al., *Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases*, 21 LAW & HUM. BEHAV. 597 (1997); Valerie P. Hans & M. David Ermann, *Responses to Corporate Versus Individual Wrongdoing*, 13 LAW & HUM. BEHAV. 151 (1989).

fendants or doctors in medical malpractice cases.¹¹⁵ Consistent with the experimental studies described above, Hans found that, on the whole, many jurors were highly suspicious of plaintiffs' motives for making claims, and they were concerned that injured plaintiffs who prevailed on liability did not get more than they deserved.¹¹⁶ On issues of matters of loss of consortium, for example, jurors applied standards of proof that appeared much more strict than those provided in law.¹¹⁷ Vidmar found comparable attitudes in interviews with jurors who had decided medical malpractice cases.¹¹⁸

II. POST-TRIAL ADJUSTMENTS TO JURY AWARDS

As discussed in the introduction to this article, most of the debate on the magnitude of jury awards has not taken cognizance of the fact that jury awards may be altered by a number of processes in the post-verdict phase of the trial. Jury verdicts are subject to review by the trial judge who can alter the award through *additur* or *remittitur* or order a new trial. The jury decision on the total amount of damages suffered by the plaintiff may be reduced by a finding of comparative negligence.¹¹⁹ The verdict may be appealed and adjusted by a higher court. Finally, the litigating parties may agree to settle for a different amount than the award, either following the verdict but before the judgment or following judgment. There may be a number of reasons for settling. The amount of the award may be greater than insurer liability limits or the resources of the defendant. There is a risk that the verdict could be overturned on appeal. A discounted award may be preferable to an extended delay in payment while the case makes its way through the appeal process. Finally, interviews conducted with lawyers in conjunction with the research reported below indicated that sometimes parties to litigation enter into a pre-trial "high-low agreement" as a hedge against the uncertainty of jury trial.¹²⁰ While they

115. See Valerie P. Hans, *The Contested Role of the Civil Jury in Business Litigation*, 79 JUDICATURE 242, 244 (1996), for a review and discussion of these studies [hereinafter Hans, *The Contested Role*]. See Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 340-43 (1999).

116. Hans, *The Contested Role*, *supra* note 115, at 244.

117. Vidmar & Rice, *supra* note 91, at 899 (citing Valerie P. Hans & Michelle Hallerding, *Juror Skepticism Towards Plaintiffs: The Example of Loss of Consortium Claims*, Address at the Biannual Meeting of the American Psychology-Law Society (Mar. 1992)).

118. See VIDMAR, *supra* note 1, at 265.

119. In fact, empirical studies of jury awards have not tended to make clear whether the data reported involved the verdict on total damages suffered or the award adjusted for plaintiff negligence, if any.

120. Anonymous interviews conducted by Neil Vidmar and Felicia Gross (1997-98 and 1998-99 academic years).

cannot settle the case because of disagreement about liability, amount of damages or both, the plaintiff wants to avoid a total loss and the defendant wants to avoid exposure to a very large award. In consequence, the parties agree in advance that the defendant will pay a certain amount even if the plaintiff loses on liability, but in return the defendant will not pay more than a certain amount even if the verdict exceeds that amount.

Despite the fact that these post-trial adjustments may have major consequences for the way that we look at the impact of jury awards, only three studies have attempted to examine them. Ostrom and his co-authors examined 744 tort trials.¹²¹ Plaintiffs won 416 cases, or 56%.¹²² Fifteen percent of the cases involved bench trials.¹²³ A motion challenging the verdict was filed by the defendant in 136 of the cases in which plaintiffs prevailed, but only eleven of the appeals were successful.¹²⁴ Sixty-seven cases agreed to settle; of these, fifty-seven involved no motions of appeal, and ten settled following an unsuccessful appeal.¹²⁵ No appeal was filed in 271 cases, or 65%.¹²⁶ A notice of appeal was filed in the remaining sixty-seven cases, but no data was available as to the final outcome of the case.¹²⁷ The total amount awarded was positively related to the decision to appeal.¹²⁸ Jury trials and cases involving awards of punitive or pain and suffering damages were more likely to be appealed than when these characteristics were absent.¹²⁹ However, Ostrom and his co-authors' study provided no information on the actual amounts of awards, judgments or settlements.

Ivy Broder reviewed a sample of 198 jury awards of \$1 million or more that occurred between 1984 and 1985.¹³⁰ Plaintiffs received the original jury award in just slightly more than a quarter of the cases.¹³¹ On average, the final aggregate disbursement to plaintiffs was 57% lower than the original verdict.¹³² The amount of the reduction varied

121. Brian Ostrom et al., *So the Verdict is In—What Happens Next?*, 16 JUST. SYS. J. 97 (1993).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. Ostrom et al., *supra* note 121, at 97.

128. *Id.*

129. *Id.*

130. Ivy E. Broder, *Characteristics of Million Dollar Awards: Jury Verdicts and Final Disbursements*, 11 JUST. SYS. J. 349, 350 (1986).

131. *Id.* at 353.

132. *Id.*

by case type.¹³³ Medical malpractice awards, for example, were reduced by 27% on average.¹³⁴ However, the average statistic obscures the fact that larger awards were reduced more than smaller awards. Broder's report did not indicate whether the reduction was made by the trial judge or an appeal court or whether it resulted from post-verdict settlements or inability to collect from the defendant.

Michael Shanley and Mark Peterson examined a sample of 161 verdicts from Cook County, Illinois and San Francisco that were returned during 1982 and 1984.¹³⁵ Of this number, forty-one cases resulted in plaintiffs prevailing at trial, a win rate of 25%.¹³⁶ The authors concluded that the actual payout of the awards was reduced in a significant number of cases.¹³⁷ A paucity of methodological details and data in the report prevents closer scrutiny of their data.

In short, there is very little information on how frequently verdicts are adjusted upward or downward or on the degree to which they are adjusted in the post-verdict stages of litigation. While Broder's study speaks to very large awards, more information is needed about what occurs for all levels of cases.

III. A STUDY OF AWARDS IN MEDICAL MALPRACTICE CASES IN THREE JURISDICTIONS

We began the present research with the insight that some jurisdictions require the jury to specify the damages for each element of the damage award. Having data on jury verdicts of this type would allow researchers to avoid the problems of *estimating* pain and suffering awards; data on both economic and non-economic awards could be summed and compared for each verdict to allow a direct assessment of what proportion of awards juries give for general damages. We turned to the states of New York, Florida, and California. Each state requires juries to render special verdicts that separate economic from non-economic damages. Moreover, for each state there are verdict reports that provide data on these awards, plus some other details such as the nature of the injury suffered by the plaintiff and the plaintiff's age. The injury data allow the same rough comparisons of awards with seriousness of injury that other researchers have used. However, in our analyses we collapsed the first four categories of the

133. *Id.*

134. *Id.* at 355.

135. MICHAEL G. SHANLEY & MARK A. PETERSON, POSTTRIAL ADJUSTMENTS TO JURY AWARDS 13 (1987).

136. *Id.* at 27.

137. *Id.* at 47.

scale because of the insensitivity of the scale to psychological traumas and because the number of cases in these categories was small. The reports also provide data on adjustments for findings of comparative negligence, judicial *additur* and *remittitur*, and settlements following verdicts that provide important insights about the differences between verdicts and the amount actually obtained by the plaintiff.

Our goal in this research is to provide a descriptive map of what samples of juries actually award for economic and non-economic damages and what occurs in the immediate post-verdict phase of the trial. As we will detail below, our close scrutiny of the data sets revealed problems that place some limits on the generalizability of our findings. The data sets are not comprehensive of all cases, and there is evidence that the selection may not be random. Moreover, reporting was often incomplete, resulting in substantial attrition in the samples. Additionally, we cannot stress too strongly the fact that our data do not provide any criteria for assessing whether the jury decisions were right or wrong. However, even with these limitations our data provide useful new information bearing on the civil jury controversy.

This article will focus exclusively on medical malpractice trials in New York City and its surrounding counties, plus similar trials in Florida and California. We will describe the data set and our findings separately for each of these jurisdictions, treating them as independent studies, but we look for similarities and differences in trends. Each of these jurisdictions has different laws, and it is likely that they have different litigation patterns and legal cultures. Moreover, there are probable differences in the representativeness of the verdict reports and the methodologies by which the data were gathered for each state. However, for each set of analyses, we maintained a uniform conceptual distinction between special and general damage awards and used the following decision rule: if there was any doubt as to whether the element was one or the other, we labeled it as general damages. This raises the possibility that the general damages component in the data set is inflated, but we decided to err in that direction.

IV. DATA AND RESULTS

A. *New York City and Surrounding Counties*

New York law requires itemized verdicts in medical, dental, or podiatric malpractice actions.¹³⁸ We focus solely on medical malpractice.

138. N.Y. C.P.L.R. 4111(d) (McKinney Supp. 1998).

1. *The Sample*

The New York data were obtained from the *New York Jury Verdict Reporter*, published by Russell F. Moran, a monthly publication that claims to report approximately 90% of all personal injury verdicts in Metropolitan New York and surrounding counties.¹³⁹ Documented submissions by attorneys are the prime source for the reported data. For this study, we collected all reported medical malpractice verdicts from 1985 through 1997 that occurred in the trial divisions of the New York Supreme Court in New York (Manhattan), Kings (Brooklyn), Bronx, Queens, Richmond (Staten Island), Nassau, Suffolk, and Westchester counties. The *Reporter* describes individual elements of the jury verdict as well as other details about the case.

There were 705 cases. Plaintiffs won 366 of these cases, a win rate of 52%. This win rate is higher than the nationwide average of around 30%.¹⁴⁰ However, the higher rate does not allow us to conclude that New York juries are more favorable to plaintiffs in comparison to elsewhere since an equally plausible explanation is that the litigation patterns by which cases are selected for trial may explain differences in win rates.¹⁴¹

For purposes of our analyses, the initial sample of 366 cases suffered attrition from various causes. No award was reported for sixteen cases. Additionally, fifty-three cases reported a general damages award that was equal to the reported total award.¹⁴² Despite the fact that one of the *Reporter's* editors said the full verdict was always reported,¹⁴³ a number of New York judges and lawyers that we interviewed said with high confidence that such verdicts would be anomalous. We did find a few cases where the *Reporter* stated that economic, or special, damages were stipulated (amounts were not given). Other cases were reported without such explanations. It is our judgment that the reported verdict in most of these cases was the total award, wrongly reported as being 100% general damages. Consequently, we treated these cases as undifferentiated and removed them from the data set. Another thirteen cases reported only a specials award. However, in contrast to the other cases, the *Reporter* provided details that gave us confidence that this was the actual verdict,

139. See Chase, *supra* note 4, at 782 for discussion of an interview with Editor Russell F. Moran on August 3, 1993.

140. See VIDMAR, *supra* note 1, at 39; Ostrom et al., *supra* note 20, at 235.

141. See Vidmar, *supra* note 30, at 1217.

142. Four cases resulted in punitive damages, but this component of the award was removed for our analyses.

143. Telephone interview conducted by Felicia Gross with Lynda Moran (Dec. 14, 1995).

so these cases were retained for the analyses. There were four cases which we decided had untrustworthy data because the sum of the special and general damages differed from the overall award by more than 5%. Thus, the working sample for total awards and post-trial adjustments was 293 cases, but the data set comparing specials with general damage components of awards was 252 cases. All awards were adjusted to 1995 consumer price index dollars.¹⁴⁴ Four awards in the sample involved wrongful death claims for which punitive damages were given. This component was not counted as part of the amount of the compensatory award.

Elements of the damage award varied considerably from case to case. We followed a strict categorizing scheme after Professor Dan Dobbs' text in determining which parts of awards were specials and which were general, including derivative awards.¹⁴⁵ For instance, spousal "loss of services" was categorized as a specials component, but "loss of consortium" was categorized as a general damages component. Decisions were primarily determined by the second author (Gross) of this article and scrutinized by the third author (Rose). Instances of continuing disagreement were resolved in discussions with the first author (Vidmar).

The severity of the plaintiff injury claim was categorized using the NAIC scale.¹⁴⁶ The second author made those ratings. Then a subsample of 126 cases was rated by another person. The inter-rater reliability of coding was calculated by a "weighted kappa" statistic and yielded a value of .82;¹⁴⁷ this value demonstrates a high degree of reliability of the ratings. The NAIC scale is widely used in estimating severity of injuries, but, as described above, we found it to be potentially misleading with respect to injuries classified as minor because its orientation to physical injury ignores severe psychological trauma.

144. UNITED STATES DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996, at 481 (1996).

145. DAN B. DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION 220-38 (1993).

146. NATIONAL ASS'N OF INS. COMM'RS 8 (1975). The scale's nine categories are as follows: (1) Emotional damage only (fright; no physical damage); (2) Temporary insignificant (lacerations, contusions, minor scars, rash; no delay); (3) Temporary minor (infections, misset fracture, fall in hospital; recovery delayed); (4) Temporary major (burns, surgical material left, drug side-effect brain damage; recovery delayed); (5) Permanent minor (loss of fingers, loss or damage to organs, includes non-disabling injuries); (6) Permanent significant (deafness, loss of limb, loss of eye, loss of one kidney or lung); (7) Permanent major (paraplegia, blindness, loss of two limbs, brain damage); (8) Permanent grave (quadriplegia, severe brain damage, lifelong care, or fatal prognosis); (9) Death. *Id.*

147. See Jacob Cohen, *Weighted Kappa: Nominal Scale Agreement with Provision for Scaled Disagreement or Partial Credit*, 70 PSYCHOL. BULL. 213 (1968).

2. Jury Verdicts, Judgments and Settlements

Table 1 reports the mean and median awards and ranges for the total sample of cases and also the same data disaggregated by the NAIC injury severity scale. However, recall that our concern with the validity of the lower categories of the scale and the number of cases persuaded us to aggregate categories 1 through 4 in all of the tables reporting our data.

The mean award for all cases was \$4,383,367. The median was considerably lower, \$1,211,550. This discrepancy reflects a few very large awards (see awards at the ninety-fifth percentile) that inflated the mean. Consistent with other studies that have used the NAIC scale, both mean and median awards increased with severity of injury except when death occurred, the award was substantially lower.¹⁴⁸ For instance in category 8, grave injury, the median award was \$9,644,460, but the median award when death occurred was \$1,076,441, almost nine times smaller. Thus, on average, awards tracked seriousness of injury. In the case of death, it is reasonable to hypothesize that awards would be substantially smaller than in the case of grave injuries because the economic costs of medical treatment for a grave injury are likely to be greater and the pain and suffering would exist over a longer time period.

TABLE 1
JURY AWARDS – NEW YORK: CATEGORIZED BY SEVERITY
OF INJURY

Severity Level	N	5 th Percentile	Median	Mean	95 th Percentile	Standard Deviation
4 or less	23	10,575	262,650	347,147	1,340,000	386,778
5	51	74,415	448,000	1,077,445	3,648,750	1,844,163
6	58	126,000	896,745	1,523,700	4,865,000	1,666,107
7 (perm.)	59	180,250	4,295,700	7,710,080	36,750,000	13,760,945
8	36	1,030,000	9,644,460	14,779,325	42,104,720	17,964,806
9 (death)	66	142,656	1,076,441	2,213,143	6,615,074	3,932,930
Total	293	104,250	1,211,550	4,383,367	17,712,500	10,115,209

Table 2 reports the mean and median awards for the 252 cases in which the verdict reporter delineated the special and general damages components of awards. Comparing the means and medians with the full sample of 293 cases reported in Table 1, it may be seen that they are not substantially different from those reported in Table 1. Table 2

148. See VISCUSI, *supra* note 4; Bovbjerg et al., *supra* note 4.

gives us no grounds for inferring that the delineated cases differed from the total sample even though we cannot rule out this possibility.

The last column in Table 2 reports the mean proportion of the total award constituted by the general damages component and the standard deviations of those mean proportions (in parentheses). Considering all cases, the average general damages proportion of awards was .58, that is 58%. However, the proportion varied as a function of the physical seriousness of the injury. For cases involving grave injury (category 8), on average 40% of the verdict involved general damages, and in cases involving death, this component was 42%.

Note one additional finding in the last column. The standard deviation of the proportion of the general damages component was .30 for all cases, but it varied by category of injury seriousness. Standard deviations ranged from .18 (category 5) to .34 (category 9). The data do not allow any explanation for the variability. One possibility is that it is random, but it is equally possible that the awards reflect differences in the severity of suffering or past and future length of suffering that the jury estimated from the trial evidence. Just as Sloan and his co-authors documented considerable variability in economic losses across injured plaintiffs,¹⁴⁹ pain and suffering and other elements of general damages may likewise vary.

Finally, we turn to the question of what happens to jury awards in the immediate aftermath of the verdict. This analysis was conducted on our larger sample of 293 cases that included both delineated and non-delineated awards (i.e., those appearing in Table 1). The *New York Jury Verdict Reporter* provided information on 112 of these cases. Fifty-seven cases settled immediately after the verdict. Two settled for the exact amount of the verdict and two settled for a greater amount. Forty-six cases settled for a lesser amount. Seven cases were listed as settled, but the amount was not reported. One case was increased by *additur* and there were four *j.n.o.v.* judgments. Twenty-three cases were reduced through *remittitur*, and seventeen were adjusted downwards because of a jury finding that the plaintiff bore responsibility for part of the loss under the comparative negligence rule. The reason for a downward adjustment in award was not reported for ten cases. In short, of the cases for which complete data were available, three were adjusted upwards from the jury award, and ninety-six were adjusted downward.

149. SLOAN ET AL., *supra* note 45, at 975.

TABLE 2
 DELINEATED JURY AWARDS – NEW YORK: CATEGORIZED BY
 SEVERITY OF INJURY AND REPORTING PROPORTION DUE TO
 GENERAL DAMAGES

Severity Level	N	5 th Percentile	Median	Mean	95 th Percentile	Standard Deviation	Mean (SD) Proportion General Damages
4 or less	14	456	372,750	462,819	1,512,000	452,988	.72 (.29)
5	39	74,415	538,721	1,213,524	5,062,304	2,043,541	.82 (.18)
6	50	126,000	950,000	1,617,664	4,794,968	1,698,545	.69 (.21)
7 (perm.)	53	344,400	4,295,700	7,996,432	36,750,000	14,425,074	.56 (.26)
8	33	1,030,000	10,048,920	15,202,560	42,251,720	18,479,278	.40 (.22)
9 (death)	63	171,360	1,095,083	2,291,558	6,614,969	4,008,767	.42 (.34)
Total	252	107,468	1,338,350	4,779,975	18,047,000	10,716,761	.58 (.30)

We can now ask what the plaintiffs received in the immediate aftermath of the jury's verdict by recalculating the data to account for the *known* adjustments. Table 3 reports the adjusted total awards for 286 cases. We see that the median adjusted award for all cases was \$892,125 compared to the median verdict award of \$1,211,550 in Table 1. This \$315,425 difference makes the median payment to plaintiffs just 73% of the original jury award. Making the same comparison with the arithmetic means shown in Tables 3 and 1, the figures are \$2,703,848 and \$4,383,367. Thus, the mean payment to the plaintiff was approximately 62% of the jury verdict. Additional analyses indicated that of the fifty cases in the sample that had the lowest awards, there were twelve reductions. In contrast of the fifty cases that had the highest awards, twenty-five were adjusted downward. Moreover, the largest downward changes involved the largest awards.

The figures reflected in Table 3 reflect substantial adjustments in both mean and median jury awards. These are likely very conservative estimates for several reasons. We know that seven additional cases were adjusted downwards, but we do not know the amounts. Other cases were listed in the *Reporter* as being appealed by the defendants. Some of these cases may have been adjusted downward by the higher court or overturned, and others may have settled for a lesser amount at a later point in the litigation process. However, lacking data on the actual outcomes of this process, we will have to be content with the known figures.

TABLE 3
ACTUAL PAYMENT TO PLAINTIFF FOLLOWING JUDGMENT AND/OR
SETTLEMENT – NEW YORK: CATEGORIZED BY SEVERITY OF INJURY

Severity Level	N	5 th Percentile	Median	Mean	95 th Percentile	Standard Deviation
4 or less	23	5,816	247,406	246,598	566,500	181,904
5	50	74,415	420,800	806,598	3,159,450	938,154
6	58	49,000	585,226	1,150,350	3,829,350	1,444,914
7 (perm.)	56	180,250	2,476,675	4,908,655	13,315,531	7,784,406
8	33	1,030,000	5,805,000	8,339,447	30,037,000	8,643,278
9 (death)	66	69,825	597,520	1,674,124	6,218,213	3,390,892
Total	286*	73,500	892,125	2,703,848	10,520,300	5,455,654

* Seven cases contain no settlement information.

Some selected case examples involving large awards help visualization of these statistics. *Kaufman v. New York Infirmary*¹⁵⁰ involved a claim of failure to administer oxygen to a premature infant that resulted in cerebral palsy, mental retardation (IQ of seventy) and spastic quadriplegia.¹⁵¹ During a seven-week trial, a nurse testified that, despite obvious signs of distress and a call for a pediatric resident, no one appeared and oxygen was not given to the child until six hours later.¹⁵² The jury awarded the plaintiff, age fourteen at trial, \$1,098,000 for future medical expenses, \$5,720,000 for nursing care, \$2,897,375 for physical therapy and \$1,400,000 for future lost earnings, for a total of \$11,115,375 of special damages.¹⁵³ Additionally, the jury awarded \$14,000,000 for past pain and suffering and, based on a life expectancy of another 62.5 years, a total of \$65,200,000 for future pain and suffering.¹⁵⁴ The total award of \$90,315,375 settled for \$7,000,000 in 1995 while post-trial motions were pending.¹⁵⁵ In short, the settlement was only 63% of the \$1 million special damage award and less than 8% of the original jury verdict.¹⁵⁶

*Whitaker v. NYCHHC*¹⁵⁷ involved a woman, age fifty-two at time of the injury, who alleged that a misdiagnosis of a constriction of her small intestine led to an infection that caused loss of all but two feet of her intestines.¹⁵⁸ As a consequence, for three years she was fed

150. 13 N.Y. JURY VERDICT REP. 44-1 (Sup. Ct. York County No. 20026/87 1996).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Kaufman*, 13 N.Y. JURY VERDICT REP., at 44-1.

157. 5 N.Y. JURY VERDICT REP. 12-34 (Sup. Ct. Bronx County No. 16491/83 1988).

158. *Id.*

through a tube in her chest for eighteen hours each day.¹⁵⁹ She weaned herself from this regimen of parenteral nutrition, but required a diet of extremely small meals.¹⁶⁰ Medical evidence presented at trial provided that parenteral nutrition would eventually be required again.¹⁶¹ The plaintiff suffered from osteoporosis and anemia as a result of her inability to ingest calcium and vitamins.¹⁶² Experts predicted that within ten years her spinal column would collapse and she would be confined to a wheelchair.¹⁶³ Required antibiotics caused middle ear damage.¹⁶⁴ The plaintiff was in constant pain, suffered urinary incontinence and was required to take an anti-diarrhea drug that is a possible carcinogen.¹⁶⁵ A medical malpractice panel decision in favor of the plaintiff was placed in evidence.¹⁶⁶ The total jury award was \$65,086,000 and included \$58,000,000 for past and future pain and suffering.¹⁶⁷ The award was reduced as excessive.¹⁶⁸ The judgment gave only \$1,000,000 for pain and suffering, and the total award amounted to \$3,200,000, less than 5% of the original jury verdict.¹⁶⁹

*Pietri v. North Central Bronx Hospital*¹⁷⁰ involved misplacement of an endotracheal tube in a twenty-four-year-old married building superintendent and painter while he was being treated for a fractured leg following an automobile accident.¹⁷¹ Cerebral anoxia led to profound brain damage reducing mental skills to level of a five-year-old person.¹⁷² The plaintiff, who had spoken four languages, initially had no memory of his wife and infant son.¹⁷³ Subsequently, his wife separated from him.¹⁷⁴ The plaintiff required lifelong institutional care.¹⁷⁵ Defendants conceded liability, and at the end of an eight-day trial, the jury awarded the plaintiff \$24,517,518, including \$20,000,000 for pain and suffering; his wife received \$3,000,000 for loss of services; \$5,000,000 was awarded to the plaintiff's mother; and \$1,000,000 was

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Whitaker*, 5 N.Y. JURY VERDICT REP., at 12-34.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Whitaker*, 5 N.Y. JURY VERDICT REP., at 12-34.

170. 6 N.Y. JURY VERDICT REP. 7-23 (Sup. Ct. Bronx County No. 6391/83 1989).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

awarded to his son.¹⁷⁶ The court set aside the awards for the mother and son.¹⁷⁷ The plaintiff's award was reduced to \$7,017,058, including \$2,500,000 for pain and suffering, and his wife's was reduced to \$1 million.¹⁷⁸ Thus, in judgment the jury's total verdict of \$33,517,518 was reduced to \$8,017,578, or *about 24% of the original verdict*. The defendant gave notice of appeal of the judgment.¹⁷⁹

*Ebert v. NYCHHC*¹⁸⁰ yielded a total jury award of \$27 million.¹⁸¹ The plaintiff, age fifteen, was injured after falling from a pier.¹⁸² The hospital did not examine him for more than an hour, and his spine was not immobilized until more than four hours after that.¹⁸³ The plaintiff, age thirty-two at trial, was rendered a quadriplegic.¹⁸⁴ In a first trial of the issues, a jury awarded the plaintiff \$2,300,000.¹⁸⁵ The plaintiff moved to set the verdict aside, and the trial judge increased the award to \$4.3 million.¹⁸⁶ A second trial was ordered after the defendant refused to pay.¹⁸⁷ Following the second verdict, the judge reduced the \$15 million award for past and future pain and suffering to \$5 million.¹⁸⁸ An award for custodial care was reduced from \$12 million to \$6.4 million resulting in a final judgment of \$11.4 million, or *about 42% of the original verdict*.¹⁸⁹

*D'Alessio v. Methodist Hospital of Brooklyn*¹⁹⁰ involved negligence in diagnosing renal failure in a two-month-old child, resulting in severe brain damage.¹⁹¹ The jury determined that Methodist Hospital was 65% negligent and the pediatrician was 35% negligent.¹⁹² The plaintiff was awarded \$26 million by the jury.¹⁹³ The trial judge reduced the \$6 million verdict for future pain and suffering to \$2.5 million, the \$12 million for future custodial care to \$2 million, and \$8

176. *Pietri*, 6 N.Y. JURY VERDICT REP., at 7-23.

177. *Id.*

178. *Id.*

179. *Id.*

180. 7 N.Y. JURY VERDICT REP. 38-5 (Sup. Ct. Kings County No. 13075/77 1991).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Ebert*, 7 N.Y. JURY VERDICT REP., at 38-5.

187. *Id.*

188. *Id.*

189. *Id.*

190. 8 N.Y. JURY VERDICT REP. 46-8 (Sup. Ct. Kings County No. 31000/83 1990).

191. *Id.*

192. *Id.*

193. *Id.*

million for future therapy to \$500,000.¹⁹⁴ The final judgment was \$5 million, but Methodist Hospital was held liable for only 65% of the amount.¹⁹⁵ The pediatrician, found 35% liable, died bankrupt before the trial began.¹⁹⁶ The parties subsequently agreed to a structured settlement with a present value of \$4 million.¹⁹⁷ As a consequence, the final amount paid to the plaintiff was *just over 15% of the original jury verdict*.

Adjustments also occur at the lower end of the award scale. Consider a single example. In *Berg v. Central General Hospital*,¹⁹⁸ a fifty-two-year-old nurse's aid alleged negligent failure to diagnose an infection of her spinal fluid.¹⁹⁹ She suffered a full seizure and brain infection and required daily treatment with anti-seizure medication.²⁰⁰ The jury awarded \$350,000 for pain and suffering.²⁰¹ The case settled for \$212,500 while post-trial motions were pending.²⁰²

B. Florida

Like New York, Florida law requires juries to render a verdict that specifies the individual amounts of special and general damages.²⁰³

1. The Sample

The data base for Florida was the *Florida Jury Verdict Reporter* that is archived in Westlaw. This data base is neither a random nor a comprehensive sample. Judges and their clerks throughout Florida select their most interesting or notable cases and forward them to Westlaw. We do not know what percent of total trial verdicts these cases represent. We gathered verdicts from trials decided for the years 1987 through 1996.

There were 525 cases in the sample. Plaintiff verdicts occurred in 233 of them, a win rate of 44%. Like the New York sample, this win rate is considerably higher than the nationwide win rate of 30% for malpractice cases. In addition to the possibilities that litigation patterns are different in Florida or that juries are more favorable to defendants in malpractice cases, the discrepancy may also be explained

194. *Id.*

195. *Id.*

196. *D'Alessio*, 8 N.Y. JURY VERDICT REP., at 46-8.

197. *Id.*

198. 10 N.Y. JURY VERDICT REP. 27-1 (Sup. Ct. Nassau County No. 13788/83 1993).

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. FLA. STAT. ANN. § 768.042 (West 1997).

by the discretion judges have in reporting cases. It seems plausible that judges are more likely to report plaintiff wins than losses because wins are associated with damage awards, and thus the sample overrepresents plaintiff wins. However, the fact is that we just cannot determine the cause or causes. Nevertheless, within the sample we can still conduct the same analyses as in New York.

Missing, incomplete, or ambiguous data reduced the initial sample to 210 cases. There were many cases for which the records reported only the total award rather than its component parts. As a consequence, the delineated sample involved just 113 cases. All the awards and settlements were adjusted to reflect 1995 dollars. The coding scheme for severity of injury was the same as used for the New York data.

2. *Jury Verdicts, Judgments and Settlements*

Table 4 reports the total awards for all of the cases. The mean of all verdicts was \$1,250,135, and the median was \$390,300. These figures are substantially lower than those in New York, but, interestingly, the medians are very close to median malpractice awards reported by Stephen Daniels and Joanne Martin in statistics derived from Los Angeles, St. Louis, Cook County, Illinois, and Dallas.²⁰⁴ The amount of these awards, like in New York, was positively related to severity of injury assessed on the truncated NAIC scale.

TABLE 4
JURY AWARDS – FLORIDA: CATEGORIZED BY SEVERITY OF INJURY

Severity Level	N	5 th Percentile	Median	Mean	95 th Percentile	Standard Deviation
4 & below	19	22,400	238,350	361,232	2,781,000	612,970
5	53	14,040	193,500	417,031	1,638,000	615,137
6	67	47,040	361,200	629,637	2,010,000	785,964
7 (perm.)	18	52,650	1,776,885	3,669,038	14,625,000	4,450,512
8	14	135,000	5,458,353	5,502,310	12,300,000	4,006,147
9 (death)	39	157,500	774,000	1,238,505	4,068,970	1,198,156
Total	210	35,020	390,300	1,250,135	6,328,350	2,297,466

Table 5 reports the delineated awards. The differences between the total awards reported in Table 5 and those reported in Table 4 reflect substantial attrition in the sample (it is only 54% of the total award data set). The median in Table 5 is a little higher than Table 4, but the mean is a little lower. The delineated sample could be unrepresentative of the total award sample, but it appears to be similar. The last

204. DANIELS & MARTIN, *supra* note 1, at 84-86.

column of Table 5 shows that the proportion of the award for general damages averaged at .54, that is 54%. This is roughly similar to the 58% figure for New York. The standard deviation of the proportion, that is .34, is similar to New York as well.

Next, consider the post-trial adjustments in Florida. Of the 210 cases reported in Table 4, the data indicated that fifty-eight were adjusted in the immediate aftermath of the jury's verdict. One case was set aside entirely with a *j.n.o.v.*, one was settled for an undisclosed amount, one settled for a smaller amount, and two settled for a larger amount than the jury's award. Of the remaining cases, forty-one were adjusted downwards because the jury found that the plaintiff had contributed to the loss, three were adjusted by *remittitur*, and three were adjusted by subtracting the amount of a prior payment to the plaintiff. Data on why adjustments made were missing for six cases.

TABLE 5
DELINEATED JURY AWARDS – FLORIDA: CATEGORIZED BY
SEVERITY OF INJURY AND REPORTING PROPORTION DUE TO
GENERAL DAMAGES

Severity Level	N	5 th Percentile	Median	Mean	95 th Percentile	Standard Deviation	Mean (SD) Proportion General Damages
4 & below	11	41,965	239,208	478,642	2,781,000	787,063	.42 (.40)
5	30	34,949	202,300	471,135	1,785,000	696,960	.48 (.34)
6	31	47,040	386,250	630,809	2,022,920	853,621	.58 (.32)
7 (perm.)	9	139,085	2,229,734	4,220,203	14,625,000	4,610,484	.54 (.32)
8	10	135,000	3,797,913	4,529,225	10,105,024	3,402,489	.49 (.34)
9 (death)	22	291,200	943,335	1,421,703	3,492,540	1,322,939	.63 (.33)
Total	113	43,260	451,136	1,358,457	6,328,350	2,267,828	.54 (.34)

Table 6 reports the means, medians, and other statistics that take into account the known adjustments to jury verdicts. Comparing the median adjusted award of \$361,200 to the unadjusted award of \$390,300 in Table 4, we see that it is about 7% lower. Comparing the mean of \$1,147,235 to the mean of \$1,250,135 in Table 4, we see that the difference is about 8% lower. Thus, compared to New York, the data suggest that post-verdict adjustments are substantially smaller in Florida. However, the initial awards in Florida were substantially smaller than in New York. We will return to this issue in our conclusions.

TABLE 6
ACTUAL PAYMENT TO PLAINTIFF FOLLOWING JUDGMENT AND/OR
SETTLEMENT – FLORIDA: CATEGORIZED BY SEVERITY OF INJURY

Severity Level	N	5 th Percentile	Median	Mean	95 th Percentile	Standard Deviation
4 & below	19	8,652	113,230	317,378	2,781,000	615,241
5	52	7,605	193,430	369,835	1,638,000	598,354
6	67	9,675	290,250	521,320	1,574,500	678,208
7 (perm.)	18	52,650	1,752,285	3,558,409	14,625,000	4,343,728
8	14	71,550	3,797,913	5,074,917	11,657,802	3,973,181
9 (death)	39	69,188	731,360	1,140,564	4,068,970	1,174,528
Total	209*	12,300	361,200	1,147,235	6,037,806	2,220,112

*n = 1 case missing on settlement information.

C. California

California law requires itemized verdicts separating special and general awards.²⁰⁵ Additionally, the law places a \$250,000 cap on general damages in lawsuits against a healthcare provider.²⁰⁶

1. The Sample

The California data were taken from the *California Jury Verdict Reporter* catalogued in Westlaw. The cases encompassed the period from 1991 through 1997.

There were 916 cases in the initial sample and plaintiffs prevailed in 206, a win rate of 22.5%. This figure is lower than the national average of 30%. It is also much lower than the win rates in the New York and Florida samples. The differences may be due to litigation patterns, representativeness of data collection, or jury behavior.

The initial data set involving jury awards consisted of 203 cases (three cases were lost due to incomplete data). Because of various types of missing data, the sample for total awards was reduced to 179 cases. Further attrition of the sample resulted when we attempted to analyze the pain and suffering component; missing data and other reporting problems reduced the sample to just ninety-two cases.

2. Jury Verdicts, Judgments and Settlements

Table 7 reports the statistics for all awards. The mean award for all cases was \$1,720,279, and the median was \$344,250. The pattern of awards in relation to seriousness of injury is generally similar to that

205. CAL. CIV. PROC. § 425.10 (West Supp. 1998).

206. CAL. CIV. CODE § 3333.2 (West 1997).

found in New York and Florida, namely awards increased with injury seriousness but were substantially lower when death occurred.

TABLE 7
JURY AWARDS – CALIFORNIA: CATEGORIZED BY SEVERITY
OF INJURY

Severity Level	N	5 th Percentile	Median	Mean	95 th Percentile	Standard Deviation
4 & below	39	7,350	137,250	539,124	1,862,000	1,216,131
5	39	10,900	152,492	389,790	1,660,960	719,743
6	35	46,598	455,260	646,397	1,813,000	650,885
7 (perm.)	11	884,450	7,985,174	14,522,142	55,094,700	17,162,831
8	15	202,035	2,920,000	4,140,161	26,053,000	6,380,585
9 (death)	40	80,088	391,300	680,812	2,133,000	630,109
Total	179	19,620	344,250	1,720,279	6,300,000	5,668,264

Table 8 reports the data for the delineated awards. The means and the medians are slightly higher than in the full working sample. The last column of Table 8 reports the percentage of the award that is for general damages and the standard deviations of those portions. For all cases the proportion is .60, but this proportion varies substantially according to seriousness of injury.

Forty-five, or 25%, of the 179 jury verdicts in the initial sample were reported as having been subject to post-verdict adjustments. Two of the cases settled for a higher amount, and two were settled for a lower amount, and one case was increased through *additur*. One verdict was set entirely aside by a *j.n.o.v.*, and eight cases had portions of the award set aside by the judge because of a payment to the plaintiff from another source. Twelve cases were adjusted downward for comparative negligence because the jury found the plaintiff to have contributed to the injury. Reasons for a downward adjustment were not reported for another two cases. Finally, twenty-four awards were adjusted downward because of statutory caps on general damages. Seven of these twenty-four include cases that were also adjusted downward because of the jury's verdict that the plaintiff's negligence contributed to the injury.

TABLE 8
DELINEATED JURY AWARDS – CALIFORNIA: CATEGORIZED BY
SEVERITY OF INJURY AND REPORTING PROPORTION DUE TO
GENERAL DAMAGES

Severity Level	N	5 th Percentile	Median	Mean	95 th Percentile	Standard Deviation	Mean (SD) Proportion General Damages
4 & below	19	7,350	307,800	335,661	1,580,500	355,056	.62 (.33)
5	19	5,775	210,000	593,664	4,125,780	966,340	.68 (.28)
6	23	54,500	455,260	744,782	1,813,000	735,168	.59 (.25)
7 (perm.)	7	884,450	6,300,000	15,102,724	55,094,700	20,338,137	.30 (.25)
8	10	202,035	3,262,500	2,855,381	5,921,053	2,165,175	.35 (.35)
9 (death)	14	190,241	350,000	668,028	1,851,000	632,692	.77 (.22)
Total	92	48,341	407,873	1,939,266	5,921,053	6,563,498	.60 (.31)

Table 9 reports the outcomes in the aftermath of the verdict. The median award for all cases was \$307,800 compared to the median of \$344,250 for unadjusted awards reported in Table 7, a reduction of about 11%. The mean award was \$1,542,449 compared to the original average verdict of \$1,720,279; this is a reduction of approximately 10%.

TABLE 9
ACTUAL PAYMENT TO PLAINTIFF FOLLOWING JUDGMENT AND/OR
SETTLEMENT – CALIFORNIA: CATEGORIZED BY SEVERITY
OF INJURY

Severity Level	N	5 th Percentile	Median	Mean	95 th Percentile	Standard Deviation
4 & below	39	4,663	137,250	498,353	1,862,000	1,211,234
5	39	10,900	147,000	261,893	1,293,600	338,251
6	35	15,000	400,000	583,082	1,813,000	614,527
7 (perm.)	11	635,470	6,300,000	13,129,967	55,094,700	17,526,568
8	15	202,035	1,545,000	3,882,063	26,053,000	6,457,314
9 (death)	40	80,088	332,150	584,507	2,106,650	577,260
Total	179	15,000	307,800	1,542,449	5,921,053	5,546,518

V. DISCUSSION AND CONCLUSIONS

Cross-jurisdiction comparisons of the data reported in this article must be approached with extreme caution because of differences in laws, litigation patterns, legal cultures, and methodological differences in the compilation of data sets. Nevertheless, there are common threads in the findings. The threads appear despite the “noise” generated by the many differences.

Following the findings of previous studies, there is a consistent relationship between the amount of verdict awards and the seriousness of injury suffered by the plaintiff. Awards increased with injury severity, except that there was a sharp decrease when death occurred.

In all three states, the percentage of the total, unadjusted damage awards exceeded 50%, on average, for all cases: 58% in New York, 54% in Florida, and 60% in California. These figures are consistent with the conclusions of other studies that utilized weaker methodologies.²⁰⁷ Considering this study in conjunction with the other studies, it seems reasonable to conclude that the general damages portion of jury awards in malpractice cases is, on average, between 50 and 60%.

Although our results mirror those of other studies, which estimate that general damages constitute approximately half of total jury awards, we are not prepared to conclude that the magnitude of these amounts stems from jury caprice or unwarranted sympathy. First, as we have noted, verdict report data cannot provide information on the basis behind the jury's decision-making process. Second, the label "pain and suffering" may be misleading because general damages encompass other elements, some of which even provide the jury discretion to consider economic consequences. At trial and in closing arguments, these elements are presented to the jury. Unfortunately, the verdict reporters seldom report these factors as separate elements, and simply classify everything under the label "pain and suffering." In New York, for example, 231 cases listed only the category of pain and suffering, although seventeen cases specifically listed "loss of parental guidance," or "loss of moral training," and two listed "emotional distress." In Florida, the reports predominantly listed pain and suffering but there were also some specific listings for "loss of companionship," "loss of consortium," "emotional distress," "disfigurement," "mental anguish," "loss of enjoyment of life," and "human damages." In California, the listings were primarily "general damages," and "non-economic damages," with some specific listings of "pain and suffering." There were a few cases that listed "loss of consortium" and "emotional distress." Absent information regarding whether juries seldom gave awards for these other elements of general damages or whether the elements were simply categorized as "pain and suffering" by the compilers of the data, we cannot go further with our analysis. Verdict reports are inadequate sources to study the reasoning behind jury decisions on general damage awards. The issues related to general damages will have to be investigated by jury interviews or other methods.

207. See *supra* Part I.

Wrongful death cases from the New York data set provide additional instructive insight about general damages, however. In New York, the proportion of the awards due to general damages components was smaller in cases of wrongful death than in cases where the patient survived, but it was still large, namely 42% of the total award. The New York pattern jury instructions for “wrongful death and conscious pain” distinguishes between pecuniary losses and any conscious pain and suffering that the decedent suffered between injury and death.²⁰⁸ Jurors are instructed that they may not consider or make any award for “sorrow, mental anguish, or injury to feeling or loss of companionship.”²⁰⁹ In deciding these losses, however, the jurors are instructed that a child’s pecuniary loss also includes damages from the deprivation of the “intellectual, moral and physical training and education which the parent would have given.”²¹⁰ While distinguishing pecuniary losses, the instructions follow the phrase “wrongful death and conscious pain” with an immediate admonishment that the jurors should consider a sum that will “fairly and justly compensate for the pain and suffering actually endured by decedent during such time as he was conscious from the moment he was injured to the moment of his death.”²¹¹ The next sentence to this instruction does not even pause for a new paragraph before instructing the jury that the estate can also recover reasonable expenses for medical aid, nursing, and loss of earnings from the date of the decedent’s injury to death.²¹²

Fine legal distinctions aside, the New York pattern instructions on wrongful death functionally merge pecuniary and non-pecuniary losses, so that even if the jury is required to state separate amounts for special and general damages, it is unlikely that they are considered as separate elements. At least in some cases, delineation of damages is not required. In *McNair v. Rubin*,²¹³ a twenty-four-year-old unmarried, unemployed woman with two children, ages five and three, died from complications of an abortion.²¹⁴ The abortion attempt caused violent contractions, causing the woman to lapse into a coma, and she died a week later.²¹⁵ The trial judge refused to charge the jury separately on loss of earnings and pain and suffering.²¹⁶ The jury returned

208. NEW YORK PATTERN JURY INSTRUCTIONS, Civil 2-320 (West Supp. 1996).

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. 5 N.Y. JURY VERDICT REP. 2-3 (Sup. Ct. Manhattan County No. 4492/81 1986).

214. *Id.*

215. *Id.*

216. *Id.*

a verdict of defendant negligence and awarded \$700,000 for wrongful death plus \$1,500 for funeral expenses.²¹⁷

The lesson from the wrongful death statute analysis shows that even formal legal instructions merge pecuniary and non-pecuniary losses. The analysis also demonstrates that some pecuniary losses are not calculable by strict accounting methods and require instead an important degree of human judgment. Taken alongside the conceptual criticism that it is inappropriate to label all general damages as "pain and suffering," this study provides information bearing on both the normative and empirical interpretation of jury awards for general damages.

In our view, however, the most important contribution of this research is the clear demonstration that the preoccupation with jury verdicts by researchers, and by legislators and the general public, is misleading. While we are not the first researchers to investigate post-verdict adjustments, this article clearly shows that the institution of the civil jury is embedded in a broader system of checks and balances and that these checks and balances operate on a regular basis to mitigate outlier verdicts and may even reduce verdicts.²¹⁸ In New York, the data showed, approximately 44% of jury awards were adjusted downward in the immediate period following the verdict and that the eventual payments to plaintiffs were, on average, 62% of the awards. Without question this is a very conservative estimate since the verdict reporters only cover a short time period following the verdict. A good number of the cases with mega-awards are included in the post-trial adjustment calculations and heavily inflate the statistical mean, but it is likely that many of these eventually resulted in much lower actual payments to plaintiffs. Recall that in some of the cases that we selected for closer analysis, some of the mega-awards actually produced payouts to plaintiffs that were less than 10% of the original jury verdict. Moreover, while some reductions were made against special damages, the vast bulk of the reductions were explicitly or implicitly tallied against general damage awards.

The reductions in average awards were less dramatic in Florida and California, but the awards themselves were substantially lower than in New York. One reasonable interpretation of these differences is that

217. *Id.*

218. Indeed, even awards that correspond to evidence on special damages may be reduced through settlement in order to avoid the delay and risks of appeals court ruling.

there was less reason for the remedial checks and balances to be applied in the former jurisdictions.²¹⁹

In concluding, we emphasize again that, absent independent criteria, jury awards alone tell us almost nothing about the fairness and justness of verdicts. We do observe, however, that the number of outlier verdicts were few in relation to the jury awards that appeared to fall within arguably reasonable ranges, at least from the perspective of the apparent gravity of injuries suffered by plaintiffs. At minimum, our research calls for more careful thought and consideration about the interpretation and evaluation of statistics about jury awards.

This research also bears on public and legislative images of the tort system. The mass media have been shown to paint a distorted picture of the tort system through the selective reporting of mega awards in medical malpractice cases and other torts.²²⁰ Smaller awards and cases in which defendants prevail (the majority of cases in most malpractice trials) do not receive coverage. Additionally, the media often do not report accurately on the type of evidence that the jury heard at trial. Finally, even though the final judgment or settlement in the case frequently occurs within days of the jury verdict, it is stale news undeserving of further coverage. The research in this article indicates that there is a substantial gap between jury awards, and the amounts that plaintiffs (and their lawyers) receive in the aftermath of jury verdicts. Policy discussions about the civil jury system and its financial consequences for plaintiffs and for defendants and their insurers need to consider this gap. There appear to be corrective forces in the litigation system that operate on outlier awards.

219. Another explanation, of course, is that the Florida and California reports were less rigorous in reporting post-trial adjustments. Still another is that these states are more conservative in making such adjustments.

220. See Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEHAV. 419, 420 (1996); Chase, *supra* note 4, at 77; Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 77 (1993).

